

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
THERESA DAWN CARLSON,)	CASE NO. 04-30383 HCD
)	CHAPTER 7
)	
DEBTOR.)	

Appearances:

Mark E. Wagner, Esq., attorney for debtor, Kizer & Neu, 1406 West Plymouth Street, P.O. Box 158, Bremen, Indiana 46506; and

Rebecca Hoyt Fischer, Esq., Trustee, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 19, 2004.

Before the court is the Trustee's Objection to Claimed Exemptions, filed on February 12, 2004, by Rebecca Hoyt Fischer, the Chapter 7 Trustee in this action. She has objected to the residential exemption claimed by the debtor, Teresa Dawn Carlson, at a value of \$100,000. At the hearing on the objection, held on April 15, 2004, the court directed the parties to file briefs. After the period for filing had expired, the court took the matter under advisement. For the reasons that follow, the court overrules the Trustee's Objection and allows the debtor's claimed exemption for her residential real estate pursuant to Indiana Code § 34-55-10-2(b)(5).

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(B) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rule of Bankruptcy Procedure 7052. Any

conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Theresa Dawn Carlson filed a voluntary chapter 7 petition on February 3, 2004. Her husband did not join her petition. On her bankruptcy schedules the debtor listed a monthly income of \$568.00 and monthly expenditures of \$791.37. Her total scheduled assets were \$103,606.00: \$100,000.00 for the residential real property and \$3,606.00 for personal property. The schedules include no secured obligations. The debtor listed, on Schedule F, six medical services holding unsecured nonpriority claims in the total amount of \$73,837.53. On Schedule C of her bankruptcy petition, the debtor claimed as exempt her interest in a residence in North Judson, Indiana, a home she owns jointly with her non-debtor husband. She stated that the current market value of the property was \$100,000.00 and that the value of her claimed exemption also was \$100,000.00, pursuant to Indiana Code § 34-55-10-2(b)(1).¹

¹ The Indiana Code provides exemption amounts in § 34-55-10-2(b). Those pertinent to this case are the following:

(b) The following property of a judgment debtor domiciled in Indiana is not subject to levy or sale on execution or any other final process from a court, for a judgment founded upon an express or implied contract or a tort claim:

(1) Real estate or personal property constituting the personal or family residence of the judgment debtor or a dependent of the judgment debtor, or estates or rights in that real estate or personal property, of not more than seven thousand five hundred dollars (\$7,500). The exemption under this subsection is individually available to joint judgment debtors concerning property held by them as tenants by the entireties.

...

(5) Any interest that a judgment debtor has in real estate held as a tenant by the entireties on the date of the filing of the petition for relief under the bankruptcy code, unless a joint petition for relief is filed by the judgment debtor and spouse, or individual petitions of the judgment debtor and spouse are subsequently consolidated.

Ind. Code § 34-55-10(2)(b)(1), (5).

The Trustee objected to the debtor's claimed exemption on three grounds. First, she asserted that Indiana Code § 34-55-10-2(b)(1) provided an exemption only in the amount of \$7,500 per debtor, and therefore that the \$100,000 claimed exemption exceeded the statutorily allowed amount. *See* R. 4 at 1. Second, she contended that, if the debtor intended to claim an exemption under § 34-55-10-2(b)(5)² rather than under subsection (b)(1), that exemption was declared to be constitutionally invalid in *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000). Finally, she suggested that the debtor's medical debts listed on Schedule F were joint obligations of the debtor and her husband and that the jointly held real estate "would be subject to the claims of such joint creditors under Indiana state law in a proceeding in state court." *Id.* The Trustee asked the court to deny the debtor's claimed exemption and to allow a real estate exemption in an amount not to exceed \$7,500.

At the court hearing held April 15, 2004, the Trustee stated that the maximum real estate exemption in Indiana for a single debtor was \$7,500, not \$100,000. Moreover, she pointed out, after *In re Cross* determined that the § 34-55-10-2(b)(5) exemption violated the Supremacy Clause of the United States Constitution, the only exemption available to the debtor was the \$7,500 exemption of subsection (b)(1). Counsel for the debtor, focusing on the debtor's medical debts, contended that those bills were debts of the debtor alone and that there was no joint obligation for them. He claimed that the debtor's spouse was only secondarily liable for those debts under the "doctrine of necessities." The Trustee responded that the debtor's husband would still be liable for her debts under Indiana law. The court directed the parties to brief the issues.

After the hearing, the debtor amended Schedule C and claimed her residence as exempt in the amount of \$100,000 pursuant to Indiana Code § 34-55-10-2(b)(5). In her Brief in Opposition to Trustee's Objection to Exemption, the debtor pointed out that she had incurred more than \$73,000 in unsecured medical debts and that her part-time employment and social security disability benefits were insufficient to pay off the obligations. She added that her non-debtor husband was retired and received only \$747.32 each month in social security

² *See* note 1, *infra*.

retirement benefits. She filed bankruptcy in order to discharge her liability for those medical bills and to keep her marital residence, so that she could receive the fresh start promised under the Bankruptcy Code.

In her brief, the debtor argued that *In re Cross* did not apply to her: In *Cross*, the debtor sought to discharge joint debts he incurred with his wife, whereas in this case the debtor's medical debts were incurred solely by her. She further claimed that, even if the debtor's husband might be secondarily liable for those debts under Indiana's doctrine of necessities, each spouse was "primarily liable for his or her independent debts." R. 13 at 2 (quoting *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 5 (Ind. 1993)). The question whether a spouse is secondarily liable is a factual determination concerning that spouse's ability to pay, the debtor contended. The Trustee did not demonstrate that, in this case, the debtor's spouse had the financial ability to pay his wife's debts, she pointed out. "Until that finding is made the indebtedness is solely that of the debtor." *Id.* at 3. Because no creditor had appeared at the debtor's 341 meeting, had filed a claim in her bankruptcy, or had pursued her husband for payment of the medical debts, the debtor concluded that those creditors "do not consider the obligations involved as a joint obligation of Mr. Carlson." *Id.* at 4. Nevertheless, she admitted her belief that, if her medical creditors would pursue both Carlsons jointly, the entirety exemption would no longer protect the marital residence. *See id.* at 5. She claimed that she "should be allowed to claim the entirety exemption as to her marital residence until such time as the trustee is able to show that debtor's medical creditors have decided to pursue Mr. Carlson on his wife's debts." *Id.* at 6.

The Trustee responded that the debtor's attempt to exempt entirety property from administration by the trustee under Indiana Code § 34-55-10-2(b)(5) could not succeed. She contended that, under *Cross*, that exemption violated the Supremacy Clause of the United States Constitution and thus was invalid. The Trustee further asserted that, because the debtor's creditors could sue the debtor and her husband in state court for the medical expenses and could execute any judgment they obtained by claiming the jointly held real estate, the exemption was invalid. She pointed out that, under *Bartrom* and its analysis of the doctrine of necessities, the non-debtor husband was jointly liable for his wife's medical expenses. Moreover, she noted, their jointly owned

real estate had a sufficient value to fully satisfy the medical obligations that the debtor sought to discharge in this bankruptcy proceeding. Finally, the Trustee pointed out that, as the representative of the debtor's bankruptcy estate, it was her duty to object to the claimed exemption and to collect and liquidate the nonexempt property of the estate.

Discussion

In this case, the debtor and her non-debtor spouse own residential real estate as tenants by the entirety. The debtor has claimed her interest in that residence as property eligible for exemption from her creditors' claims. The court now considers the Trustee's objection to the debtor's claimed exemption in that real estate. The Trustee, as the objecting party, has the burden of proving that the exemption is not properly claimed. *See* Fed. R. Bankr. P. 4003(c); *In re Cross*, 255 B.R. 25, 30 (Bankr. N.D. Ind. 2000).

Although 11 U.S.C. § 541(a) includes all of a debtor's legal and equitable interests in property as property of the bankruptcy estate available for the benefit of the debtor's creditors, § 522(b) of the Bankruptcy Code permits a debtor to exempt, under the federal or applicable state exemption provision, his or her interest in property that cannot be reached by creditors. In particular, the Code allows an exemption for entirety property, as provided under § 522(b)(2)(B):

[A debtor may exempt] any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

11 U.S.C. § 522(b)(2)(B). The Code also allows states to opt out of the federal exemption scheme. Indiana has enacted its own exemption statute, now set forth at § 34-55-10-2(b).³ “[T]he state exemptions apply to bankruptcy proceedings of its citizens.” *Meyer v. Hammes*, 187 B.R. 281, 284 (S.D. Ind. 1995). “Indiana courts

³ The present exemptions statute, Indiana Code § 34-55-10-1 *ff.*, became effective July 1, 1998. It was simply a re-enactment of the previous statute, Indiana Code § 34-2-28-1. Thus, the provisions permitting an exemption for tenancy by the entirety property, found earlier at § 34-2-28-1(a)(5) and now at § 34-55-10-2(b)(5), are the same. For that reason, the cases discussing the earlier provision are valued precedents.

have a longstanding practice of construing exemption statutes liberally in favor of the debtors for whose benefit they were enacted.” *In re Robertson*, 227 B.R. 844, 846 (Bankr. S.D. Ind. 1998).

However, all non-exempt property of the estate is available to the bankruptcy trustee, who has the power to sell or use it for the benefit of the debtor’s creditors under § 363(b)(1). The Code specifically allows the trustee to reach property held by a debtor as a tenant by the entirety, subject to a claimed exemption and other limitations provided in § 363(h). *See In re Paeplow*, 972 F.2d 730, 735 (7th Cir. 1992) (stating that “the Code permits the trustee to sell entirety property to satisfy the claims of joint creditors, in proper circumstances”); *In re Hunter*, 970 F.2d 299, 303 (7th Cir. 1992) (“The Code provides that the trustee may sell both the debtor’s and the spouse’s interest in such property, subject to certain conditions”). The Seventh Circuit has explained the extent of that entirety property exemption under the Code:

In a state such as Indiana, whose common law grants entirety property immunity from creditors of one spouse alone, the effect of section 522(b)(2)(B) — standing alone and without any reference to state statutory exemptions — is partially to exempt entirety property: the property is subject to sale and distribution to joint creditors, but exempted from claims of individual creditors.

In re Hunter, 970 F.2d at 307.

Section 522(b)(2)(B) grants the debtor an entirety exemption to the same extent that the debtor would be allowed such protection “under applicable nonbankruptcy law.” The court therefore examines applicable Indiana law for its treatment of tenancy by the entirety property.

Under Indiana’s property law, tenancy by the entirety is “a common law form of marital ownership that creates between spouses joint ownership of an undivided interest in property which may not be transferred or encumbered by either spouse acting alone.” *In re Paeplow*, 972 F.2d at 733. Generally, a debt owed jointly by a husband and wife may be enforced against property held as tenancy by the entirety, but a debt owed by one spouse alone may not be enforced against such entirety property. Therefore, tenancy by the entirety property is unavailable to all creditors except those to whom the spouses are jointly indebted. *See Mid-West Fed’l Savings Bank v. Kerlin*, 672 N.E.2d 82, 85 (Ind. Ct. App. 1994) (“By its nature, property owned in a tenancy by the

entireties is immune to seizure and satisfaction of the individual debts of either husband or wife.”) (citing Ind. Code § 32-4-2-1, now § 32-17-3-1).

The parties do not disagree that the debtor’s residence was included in her bankruptcy estate under § 541 and that it was the type of property entitled to receive an exemption under Indiana law. *See In re Paepflow*, 972 F.2d at 736-37 (noting that, under Indiana law, a debtor “has a sufficient individual interest in entirety property to bring that property into the bankruptcy estate” and that “congress intended entirety property to enter the bankruptcy estate and to pass out of the estate if subject to an exemption, and if claimed by the debtor on his or her bankruptcy schedules”); *In re Robertson*, 227 B.R. at 845 n.2 (same). Indiana permits an exemption of entirety property under two provisions of the Indiana Code, § 34-55-10-2(b)(1) and (b)(5). The exemption found at § 34-55-10-2(b)(1) is generally available to homeowners who file bankruptcy. It brings a debtor’s residence into the estate and back out of it to the extent of the claimed exemption. *See In re Cross*, 255 B.R. at 37; *see also Meyer*, 187 B.R. at 283. That exemption provides \$7,500 for each debtor on his or her residential property. The court finds that the debtor is entitled to the \$7,500 exemption of Indiana Code § 34-55-10-2(b)(1). The Trustee urges the court to hold the debtor to the (b)(1) exemption and to deny the (b)(5) exemption the debtor listed on her amended schedules.

The Trustee objects to the debtor’s claimed exemption of the full value of her entirety property, under Indiana Code § 34-55-10-2(b)(5), on the ground that statute has been found unconstitutional. She relies on *In re Cross*, in which Judge Robert E. Grant, of the United States Bankruptcy Court of the Northern District of Indiana, Fort Wayne Division, determined that this provision was rendered invalid by the Supremacy Clause of the United States Constitution because its effect was “to completely exempt the entirety property from administration by the bankruptcy trustee, even though it would have been amenable to process on behalf of joint creditors, outside of bankruptcy.” *In re Cross*, 255 B.R. at 37. The Trustee argues that the debtor’s medical debts are joint obligations and that the debtor cannot claim the unconstitutional entirety exemption provision. The debtor, rather than challenging the ruling in *Cross*, responds that her debts are not joint and thus that her

exemption is protected under § 34-55-10-2(b)(5). The court considers the propriety of the debtor's claimed exemption of her entirety property in light of the Trustee's objections.

A. Joint or individual obligations

The first issue to be addressed by the court, in deciding whether the debtor's tenancy by the entirety property qualifies for an exemption, is whether the debts owed to the creditors are joint debts of the debtor and her husband. The Trustee's objection to the debtor's claimed exemption is based on her assertion that the debts are joint. Recognizing that the debtor's entirety property is protected from the claims of individual creditors but may not be shielded from the claims of joint creditors, the court begins by considering whether the debtor's six medical debts listed on Schedule F are individual or joint obligations.

The debtor filed a single chapter 7 petition, one which her husband did not join. None of the debts on Schedule F, the list of the debtor's unsecured creditors, is identified as a joint obligation, and nothing in the record suggests that there are creditors holding claims against both spouses based upon a joint debt. The debtor stated in her brief that she alone incurred those bills as a result of her medical treatment. She argued that she "should be allowed to claim the entireties exemption as to her marital residence until such time as the trustee is able to show that debtor's medical creditors have decided to pursue Mr. Carlson on his wife's debts." R. 13 at 5. The Trustee considered the medical bills to be joint debt and contended that the joint creditors could reach the entirety property:

The real question in this case is therefore whether the creditors listed in Mrs. Carlson's schedules could sue Mr. and Mrs. Carlson in state court for the medical expenses, obtain a judgment, and execute on the jointly held real estate. The answer to that question is yes. The exemption claimed by the Debtor is therefore invalid.

R. 18 at 2.

The court finds that the critical factor in determining a debtor's right to an exemption is not whether the creditors have taken legal action or could file suit in the future. The well established rule is that a debtor's right to exemptions is fixed on the date of the bankruptcy petition. *See White v. Stump*, 266 U.S. 310, 312-13,

45 S. Ct. 103, 69 L.Ed. 301 (1924); *Gotswami v. MTC Distributing (In re Gotswami)*, 304 B.R. 386, 391-92 (B.A.P. 9th Cir. 2003); *see also Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 902 (7th Cir. 2000) (stating that the valuation of an asset, for exemption purposes, is determined by its fair market value on the petition date). It is also clear that the existence of a joint debt on the date of the petition precludes the exemption of entirety property under Bankruptcy Code § 522(b)(2)(B) to the extent of the joint debt. *See In re Houck*, 184 B.R. 21, 24 (Bankr. E.D. Pa. 1995). Indiana Code § 34-55-10-2(b)(5) likewise requires that the debtor's interest in real estate held as a tenant by the entirety be determined, for exemption purposes, on the petition date. In this case, the existence of a joint creditor on the date of the debtor's petition might lead the court to deny the exemption of the debtor's entirety property and to allow the trustee to seize the debtor's entirety property for the benefit of that joint claim. *See Smith v. Beneficial Fin. Co.*, 218 N.E.2d 921, 923 (Ind. Ct. App. 1966) (finding that Indiana has long permitted creditors holding joint claims against a husband and wife to reach entirety property to the extent of the joint debt).

However, it was the burden of the Trustee, as the party objecting to the exemption, to prove that the claimed exemption was not proper. *See Fed. R. Bankr. P. 4003(c)*. The Trustee therefore had the duty to demonstrate that there was joint debt on the date of the petition and that the entirety property did not qualify for an exemption. The debtor provided her schedules, which reflected no joint creditors, and denied that any debts were joint. The Trustee asserted that the claims were joint but produced no evidence, at the hearing or in her briefs, upon which this court could base a finding of joint obligation. The court, after examining the debtor's schedules and finding no evidence of debt that would qualify as joint, finds that the Trustee has failed to uphold her burden of producing evidence that the medical bills were joint obligations of the debtor and her husband. *See Ceck v. Maloney (In re Maloney)*, 146 B.R. 168, 170 n.1 (Bankr. W.D. Pa. 1992) (finding that the trustee offered no credible evidence of joint obligations and thus that the debtor had no joint obligations except the mortgages). Accordingly, the court determines that, based on the evidence before it, the medical obligations

listed on Schedule F of the debtor's schedules are the individual debts of the debtor on the date the bankruptcy petition was filed.

B. Constitutional Validity of Indiana Code § 34-55-10-2(b)(5)

The court now considers whether it must deny the debtor's claimed exemption under Indiana Code § 34-55-10-2(b)(5) because the statute has been found to be unconstitutional. In *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000), Judge Grant presented a comprehensive analysis of Indiana's tenancy by the entirety exemption and found that it created an exemption that was available only in the event a debtor filed bankruptcy. *Cross*, 255 B.R. at 36.

[O]utside of bankruptcy, Indiana law allows entireties property to be used to satisfy the claims of creditors, but only for the joint debts of both spouses; it may not be used to satisfy the debts of only one spouse. Indiana Code 34-2-28-1(a)(5) changes this in bankruptcy. It completely exempts entireties property from administration by a bankruptcy trustee where only one of the two spouses files bankruptcy, without regard to the existence of joint creditors. *Hunter*, 122 B.R. at 358. "By allowing the debtor to completely exempt his interest in entirety property from the bankruptcy estate, Indiana has not preserved the amenability of that property to creditors but shielded it from all creditors, including joint creditors." *Hunter*, 970 F.2d at 308.

Id. at 32. *Cross* found that the state statute's complete exemption of entirety property from any creditor conflicted with federal bankruptcy laws, which do not exempt entirety property from the claims of joint creditors. In *Cross*, the debtor and his non-debtor spouse had joint creditors whose claims would have been partially satisfied under Indiana non-bankruptcy property law and under the Bankruptcy Code. However, under Indiana's exemption statute the entirety property was completely exempt and the joint creditors would have received nothing. As *Cross* commented: "Here we have such a conflict, not only because the exemption in question is available only in the event of bankruptcy but also because it overrides Congress's decision as to how entireties property should be administered when only one spouse files bankruptcy." *Id.* at 37. *Cross* concluded that the statute was rendered invalid by the Supremacy Clause.

The court has also reviewed *Meyer v. Hammes*, 187 B.R. 281 (S.D. Ind. 1995), the decision of Judge Sarah Evans Barker, then Chief Judge of the United States District Court in the Southern District of Indiana, who

also considered whether the entirety exemption violated the Supremacy Clause and came to the opposite conclusion:

Far from conflicting with federal law, the state statute appears completely consistent with the Bankruptcy Code. . . . While Indiana’s exemptions scheme may exempt less of a debtor’s property than does the federal scheme, this difference alone does not make the Indiana statute unconstitutional. . . . Based on the plain wording of 11 U.S.C. § 522(b), and its interpretation by the Seventh Circuit, this Court holds that Indiana Code section 34-2-28-1(a)(5) does not conflict with the exemption provisions of the Bankruptcy Code and therefore does not violate the Supremacy Clause.

Meyer, 187 B.R. at 284-85.

The court first notes that *Cross* and *Meyer*, like the case now before this court, concern a debtor and non-filing spouse who own residential property as tenants by the entirety. However, each of those cases is distinguishable from Mrs. Carlson’s circumstances. In this case, the debtor’s medical debts listed on Schedule F are her individual obligations. In contrast, the creditors in *Cross* were joint creditors of the debtor and his non-filing spouse; the court therefore found that the entirety property would be available to the joint creditors outside of bankruptcy but not under the invalid Indiana exemptions statute. In *Meyer v. Hammes*, the husband’s and wife’s separately filed chapter 7 petitions were consolidated; the bankruptcy court then denied entitlement to an entirety exemption because the statute expressly disallowed the exemption when petitions were subsequently consolidated. The district court, affirming that determination, fully addressed and rejected the debtors’ argument that Indiana Code § 34-2-28-1(a)(5) violated the Supremacy Clause of the United States Constitution. In light of these significant factual differences, the court need not choose between the conflicting positions of two esteemed colleagues.

The court notes as well that the plaintiff asserted, without presenting any constitutional arguments, that the state exemptions provision was unconstitutional under *Cross*. Because the court finds that, in this case, the debts are individual to this debtor, rather than joint, it determines that *Cross* is distinguishable and that it is unnecessary to speculate about the constitutional issue. *See Frey v. E.P.A.*, 270 F.3d 1129, 1135 (7th Cir. 2001). Moreover, the court is aware that it should “construe a statute in a way that avoids a constitutional problem, if

that is fairly possible.” *Chowdhury v. Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001). Indiana law is settled and, consistent with federal bankruptcy law, exempts entirety property from the claims of individual creditors of only one spouse. The debtor herein is not seeking to use the Indiana entirety exemption to protect her property from joint claimants. For that reason, the application of Indiana Code § 34-55-10-2(b)(5) raises no constitutional issues in this case. Accordingly, the court declines to make its determination concerning the debtor’s claimed exemption of her entirety property under subsection(b)(5) on constitutional grounds.

C. *Validity of Debtor’s Claimed Exemption*

The court is persuaded by the precedential analyses of the Seventh Circuit Court of Appeals in *In re Hunter*, 970 F.2d 299 (7th Cir. 1992), and in *In re Paepflow*, 972 F.2d 730 (7th Cir. 1992), that entirety property is protected from claims against a husband or wife individually. In each of those decisions, the appellate court noted the changes made by the Bankruptcy Code of 1978, which corrected inequitable results created by the Bankruptcy Act of 1898, and the corresponding changes in Indiana practice under the Code.

Under the old Bankruptcy Act, entirety property never entered the bankruptcy estate and could not be touched by the trustee. . . . [T]his is no longer the case: entirety property does enter the estate and may be sold by the trustee to satisfy claims by joint creditors. . . . Under the Code . . . , the entirety property is no longer foreign to the jurisdiction of the bankruptcy court; the bankruptcy court can reach entirety property and adjudicate claims of joint creditors. Thus, . . . the reason supporting the old Indiana practice no longer exists.

In re Hunter, 970 F.2d at 309. In *Paepflow*, the appellate court found that the Bankruptcy Code “permits the trustee to sell entirety property to satisfy the claims of joint creditors, in proper circumstances, and the rationale underlying the pre-Code Indiana decisions is therefore no longer viable.” *Id.* at 735. It acknowledged “Indiana’s decision to grant its residents such sweeping protection of entirety property from the claims of creditors in bankruptcy,” and described the state statute’s broad exemption of entirety property in bankruptcy:

Thus, we conclude that the Indiana legislature intended § 34-2-28-2(a)(5) to shield the entirety property of a debtor in bankruptcy from the claims of creditors — including joint creditors — to the greatest degree possible. Under § 34-2-28-1(a)(5), Indiana has in effect exempted entirety property — if listed by a debtor — from administration by a trustee in bankruptcy.

Id. at 737. Although the court hinted at misgivings concerning the breadth of the statute, it recognized “the strong fresh start policy embodied in the Code” and refused “to subvert that policy” through judicial legislating.⁴ *Id.*

This court is cognizant of Indiana’s long-standing common law principles that insulate entirety property from the claims of individual creditors. *See, e.g., National City Bank v. Bledsoe*, 144 N.E.2d 710, 713 (Ind. 1957) (stating that “our law still adheres to the common law fiction that husband and wife are one person, so far as such concept pertains to real estate held by them as tenants by the entirety”); *In re Estate of Shoaf*, 750 N.E.2d 426, 428 (Ind. Ct. App. 2001) (explaining that, under Indiana law of tenancy by the entirety, “the interest of each [husband and wife] comprehends the entire fee”). That bedrock law of property, exempting tenancies by the entirety from claims against either spouse individually, is well established in this state and in many other jurisdictions across the nation.⁵ Under Indiana’s tenancy by the entirety law, therefore, entirety property outside bankruptcy is unavailable to all creditors except joint creditors. Under the Bankruptcy Code, as well, entirety property is exempted from the claims of individual creditors but not from the claims of joint creditors. *See* § 522(b)(2)(B). Thus, both federal bankruptcy law and state law shield entirety property from the claims of individual creditors. Because this case involves individual debts of the debtor, the court can recognize the propriety of the debtor’s claimed exemption under Indiana Code § 34-55-10-2(b)(5) without resolving the issue concerning claims made by joint creditors on entirety property under that provision.

⁴ In *Hunter*, the Seventh Circuit stated that “the potential for legal fraud is attributable to the Indiana statutory exemption, Ind. Code § 34-2-28-1(a)(5), not to the provisions of the Bankruptcy Code.” *Hunter*, 970 F.2d at 310. In *Paepflow*, the appellate court stated that “the plain language of the statute, which applies only to bankruptcies, appears to grant an individual debtor who holds an interest in entirety property a complete exemption from the claims of all creditors, including those made by joint creditors of both spouses.” *Paepflow*, 972 F.2d at 733. However, in each case the court declined to consider constitutional challenges to the statute because the arguments had not been made to the court.

⁵ The Seventh Circuit recognized Indiana’s retention of the common law tenancy by the entirety in *Paepflow*, 972 F.2d at 733, and *Hunter*, 970 F.2d at 307. However, circuit courts regularly, and more recently, reviewed decisions recognizing tenancy by entirety property laws similar to those in Indiana. *See, e.g., Bunker v. Peyton (In re Bunker)*, 312 F.3d 145 (4th Cir. 2002) (Virginia law); *Blachy v. Butcher*, 221 F.3d 896 (6th Cir. 2000), *cert denied*, 532 U.S. 994 (2001) (Michigan law); *United States v. Green*, 201 F.3d 251 (3d Cir. 2000) (Pennsylvania law); *Birney v. Smith (In re Birney)*, 200 F.3d 225 (4th Cir. 1999) (Maryland law); *Havoco of America, Ltd. v. Hill*, 197 F.3d 1135 (11th Cir. 1999) (Florida law).

The court also declines to make any determination concerning the financial ability of the non-filing spouse to pay the debtor's medical obligations. Whether the debtor's husband is liable for the debtor's medical bills under Indiana's doctrine of necessities is not an issue before the court on the Trustee's Objection to Claimed Exemptions. The court will not speculate or offer an advisory opinion concerning possible suits by creditors that have not yet filed claims in this court or lawsuits in any court. The sole determination of this court is that the debtor is granted an exemption in her interest in residential real estate she holds as a tenant by the entirety on the date of the filing of her bankruptcy petition.

The court therefore overrules the Trustee's objection and allows the debtor's exemption under Indiana Code § 34-55-10-2(b)(5) to the extent of the debtor's equity in the residential real estate.

Conclusion

For the reasons stated above, the court overrules the Trustee's Objection to Claimed Exemptions. It grants the exemption claimed by the debtor Theresa Dawn Carlson on her tenancy by the entirety property, pursuant to Indiana Code § 34-55-10-2(b)(5), in the amount of \$100,000, the debtor's equity in the residential real property on the date the debtor's chapter 7 petition was filed.

SO ORDERED.

Handwritten signature of Harry C. Dees, Jr. in black ink, with the letters "JSOI" written in small print at the bottom right of the signature.

HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT